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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 205

OZARK DAIRY COMPANY, a Corporation, and JOHN BRAUCH, an Individual, d/b/a Cool Valley Dairy,
Petitioners,
vs.
ADAMS DAIRY COMPANY, a Corporation; ADAMS DAIRY, INC., a Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation; NATIONAL DAIRY PRODUCTS CORPORATION, a Corporation; ACF-WRIGLEY STORES, INC., a Corporation; THE KROGER COMPANY, a Corporation; SCHNUCK MARKET DELLWOOD, INC., a Corporation; SCHNUCK MARKET FLORISSANT, INC., a Corporation; SCHNUCK MARKET OVERLAND, INC., a Corporation; SCHNUCK MARKETS BRENTWOOD, INC., a Corporation; SCHNUCK MARKETS MANCHESTER, INC., a Corporation;
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

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THE OPINIONS BELOW.

There are no official or unofficial reports of the opinions below. The rulings of the United States District Court for the Eastern District of Missouri, Eastern Division, and the United States Court of Appeals, Eighth Circuit, complained of by Petitioners are set forth in the Petition.

QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether the District Court shall be ordered to grant Petitioners' request for a jury trial, taking into consideration Rule 38 (b) and (d) which reads as follows:

> (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> (d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATEMENT.

As stated in the Petition, the action below was filed on November 5, 1958, and thereafter all Respondents herein filed Answers. All of the original Answers of Respondents were filed by April, 1960. On February 23, 1962, the District Court set the case for trial on June 4, 1962. No demand for jury trial was made until May 11, 1962. On May 4, 1962, several of the Respondents, by leave, filed Amended Answers. Defendant, National Dairy Products Corporation, did not amend the answer it had filed nearly two and a half years before. On May 18, 1962, the District Court ordered that the leave to file said Amended Answers be withdrawn and such Answers were ordered stricken. By the same order said Court sustained Respondents' motion to strike Petitioners' demand for a jury trial. Petitioners sought leave from the Court of Appeals, Eighth Circuit, to file a petition for mandamus against the Judge of the District Court. The relief sought was that the trial Judge be required to grant Petitioners a jury trial. The Court of Appeals denied leave to file the petition (Petition, Exhibits B and C).

ARGUMENT.

I.

No Important Question of Federal Law Was Decided Below, and There Are No Special or Important Reasons Requiring Review by This Court.

No question is involved here that warrants review pursuant to Rule 19 of the Rules of this Court. That rule makes it clear that only questions of importance will be reviewed upon certiorari. In the present case, the sole question is whether a District Court, under the facts and circumstances peculiar to this case only, erred in refusing to grant a jury trial. If this was error on the part of the District Court, and Respondents insist that it was not, the question may be presented upon appeal from any final order. This procedure is the one customarily followed. (See **Curry v. Pyramid Life Ins. Co.**, C. A. Mo. 1959, 271 F. [2] 1, Cert. den. 361 U. S. 933; **American Fidelity & Cas. Co. v. All Am. Bus Lines**, C. A. Okla. 1951, 190 F. [2] 234, Cert. den. 342 U. S. 851.) Thus there is no matter of great importance to be brought before the Court for review. It may appear important to the parties, but that is not the criterion to be applied; the question must be one of general importance to the administration of Federal justice. As Mr. Chief Justice Hughes pointed out in an address to the **American Law Institute**, 20 A. B. A. J. 341:

> "That review [on certiorari], we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general impor-

tance so that the system of Federal justice may be appropriately administered."

And, as pointed out in an article in 48 **Harvard Law Review** 271, referring to prior Rule 38 of the Rules of the Supreme Court: "The crux of its meaning is in the word 'important.'"

II.

Petitioners Waived Their Right to a Jury Trial.

The Petition shows that Petitioners did not demand a jury trial until approximately three and one-half years after their suit was filed. The transcript (Petition, Exhibit A, page 14) shows that Petitioners' attorney admitted to the District Judge on May 18, 1962, that "until your Honor mentioned it" during the previous week he did not know that there had been no demand for a jury trial. It is obvious that Petitioners have seized upon the slight amendment made in the several answers filed to excuse their clear waiver of a jury by failure to comply with the provisions of Rule 38.

The cases are, of course, uniform in holding that a District Court may allow a belated jury demand, but this is entirely within the discretion of the District Judge, and a denial by him is not appealable nor subject to review or reversal in mandamus proceedings, **Petsei v. Riley**, C. A. 8 1951, 192 F. (2) 954, 955, and the holdings are to the same effect even though the failure to make a timely demand was due to neglig nce or inadvertence of former counsel, **May v. Melvin**, C. A. D. C. 1944, 141 F. 2d 22; **Scrinko v. Reading Co.**, D. C. N. J. 1954, 117 F. Supp. 603.

An examination of the amendments made in the several answers reveals that they contain the same allegations as

those contained in the answer of respondent National Dairy Products Corporation, Petition, page 43. This answer had been on file since 1959. Thus, the issues were not changed by the amendments; the issues had always been in the case, and if a jury trial were desired as to such issues a demand should have been made within 10 days of the filing of the answer above-mentioned. Moreover, the matters set forth in the amendments merely pleaded another affirmative defense. They did not, in any way, change the principal and main issues.

Once a jury trial is waived it cannot be revived by a belated amendment of the pleading touching the same general issues. In **Roth v. Hyer**, C. A. 5, 1944, 142 F. 2d 227, Cert. den. 325 U. S. 712, we find a case which is somewhat similar on the facts. There, in an action on a contract, a demand for jury trial was made. It was denied as not having been made within due time. The case was tried by the judge and judgment entered for the defendants. It was reversed, and upon again coming on for trial, defendants sought to amend their answer, and a demand for a jury trial was again filed. The judge refused to allow the amendment, and denied the jury demand. The appellate court held that the right to make such a demand is not revived by a belated amendment.

The holding of the **Roth** case, supra, is reiterated in **Moore v. United States**, C. A. 5 1952, 196 F. 2d 906, and it is there held that the Bereslawsky case, cited by Petitioners, and other similar cases, are not pertinent as the amendment in question dealt with the same general issues.

Certainly the discretion of a trial judge in denying an untimely jury demand will not be reviewed by this Court.

III.

The Amendments to the Answers Were Stricken. No New Issue Is in the Case.

Petitioners' only ground for asserting that their jury demand was timely is that it was filed within 10 days after amended answers were filed by certain Respondents. The Petition shows, page 6, that **the trial Court ordered such amended answers stricken** at the same time he denied the jury demand. Thereupon, the only issue that Petitioners could conceivably contend was new in the case went out of the case; and **is not now in the case at all.** The case is now in exactly the same posture as it was in April, 1960, when the last of the original answers was filed. If a jury trial were now granted it would result in a trial of the same issues as those which would have been tried by a jury if the Petitioners had made their request back in April, 1960. And, bearing in mind that National Dairy Products Corporation filed no amended answer, and the right to a jury trial has been expressly waived as against that Respondent, the Court would be placed in the anomalous position of either (a) attempting to try the issues as to certain Respondents by a jury while the Court itself tried the same issues without the aid of a jury, or (b) forcing National Dairy Products Corporation to go to trial before a jury because of amended pleadings filed by other Respondents over whom National Dairy Products Corporation had no control.

IV.

No Case Cited by Petitioners Sustains Their Position.

The Index to the Petition indicates that Petitioners cite five cases to sustain their contention that they are en-

titled to a jury trial. Two of the cases are, in fact, merely cited in quotations from other opinions. Each case will be considered.

In **Beacon Theatres, Inc., v. Westover**, 359 U. S. 500, no question of waiver of a jury trial was involved. In that case plaintiff filed a declaratory judgment action seeking to enjoin defendant from instituting against plaintiff any action for a violation of the antitrust laws and seeking declaratory relief. Defendant counterclaimed with a treble damage, antitrust action, and demanded a jury trial. The lower courts held that the demand was rightfully refused. This Court reversed the holding, stating that the right to a jury trial cannot be lost by a determination of the issues in connection with an equitable claim.

The second case cited by Petitioner is **Canister et al. v. Leahy**, 191 F. 2d 255, C. A. 3, 1951, cert. den. 342 U. S. 893. In that case the question of a timely jury demand is not involved. A jury trial was denied so long as the parties sought only equitable relief. Plaintiffs asked and were granted leave to file amended complaints seeking money damages instead of equitable relief. At the time the amended complaints were filed plaintiffs again demanded a jury trial. A jury trial was ordered, but the demand was later stricken, and the petition for mandamus filed. The appellate court held that the granting of a jury trial was proper. Thus, as in the **Beacon** case, supra, the holding is that a jury trial should be granted whenever a jury issue first comes into a case.

The third case cited by Petitioners is **Bereslawsky v. Kloeb**, C. A. 6, 1947, 162 F. 2d 862. That case involved an action for an injunction and accounting by reason of patent infringement. Before trial an amendment was allowed striking the prayer for equitable relief and substituting

therefor a prayer for money damages. Five days after the amendment was allowed plaintiff demanded a jury trial. A motion to strike the jury demand was thereafter granted. Mandamus was allowed ordering a jury trial. The facts and the holding are to the same effect as the two cases above considered. A belated demand was not involved.

Dimick v. Scheidt (1935), 293 U. S. 474, cited by Petitioners has no relevance whatever to the issues here involved except to recognize the importance of maintenance of the right to jury trials. The case holds only that a trial court cannot increase the amount of damages awarded by a jury as an alternative to allowing plaintiff's motion for a new trial on the ground that the damages allowed were inadequate.

The fifth, and last, case cited by Petitioners is **Ex Parte Fahey**, 332 U. S. 258. This case was an original action brought in this Court seeking an order directing a District Judge to vacate an order allowing attorneys' fees. This court held that while it had the power to issue extraordinary writs, such writs could not be used as substitutes for appeals.

It will be seen from the foregoing analysis that none of the cases cited by Petitioners sustain their position. None of them involve a belated jury demand. Petitioners' suit below does not involve an amendment substituting a prayer for money damages for one for equitable relief. As a matter of fact, as heretofore stated, the amendments upon which Petitioners base the timeliness of their jury demand were stricken, thus leaving Petitioners in exactly the same position they were years ago when their right to demand a jury expired.

CONCLUSION.

In view of the above, we respectfully submit that the Petition for Writ of Certiorari should be denied.

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